(b) The amendment will cause prejudice to the Government because it may be that the plaintiff may be able to succeed on "this cause of action";

(c) The amendment seeks to introduce a new cause of action.

The law is that if a party intends to apply for determination of a point of law he must raise it on his pleadings. But at the trial itself he may raise a point of law open to him even though not pleaded and in a proper case the court will allow the party to amend his pleadings so as to raise a point of law for argument.

The general principles of granting leave to amend pleadings were laid down by Bramwell L.J., in the case of *Tildesley* v. *Harper*[1] where he said:

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

Brett M.R. in *Clarapede & Co.*, v. *Commercial Union Association*[2] said:

"However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

The only question which arises in this case is whether the plaintiff was wrongfully dismissed and he certainly had a right to challenge the validity of regulation 44 of the Public Officers (Conduct and Discipline) (General Orders) Regulations 1969 in the first instance. He is asking the court to declare that the order of his compulsory retirement, termination of service, removal, dismissal or whatever name is attributed to it should be declared null and void as it offends the provisions of the Constitution and the rights guaranteed to him thereunder. The only point which is involved in the determination of this suit is a question of law or constitutes a series of questions of law. I am not inclined to think that in the position in which the plaintiff is the present application can be called *mala fide*. He has no doubt brought the Government to court and the Government itself has as much right to fight and resist the claim of the plaintiff as has any other individual in a court of law. It is, however, sometimes said that in dealing with its subjects and citizens the State ought to be a little magnanimous in its attitude to allow its subjects to fully air their grievances in courts of justice and not put in procedural impediments in their way. The Government has its rights under the law and I am bound to respect those rights in the same way as if those rights were the rights of an ordinary citizen who appeared in court. If the Government is no higher, it is certainly no lower than any other litigant in the eye of law. I shall therefore deal with the application on that basis alone.

The argument that the plaintiff may be in a position to succeed if the new amendment is allowed is frail and feeble. The courts exist for the administration of justice and to redress wrongs and do not become mere instruments of procedure at the instance of one party to obstruct the path leading to justice or means to redress of a wrong. The procedure of the court, in fact, is designed to facilitate justice and to keep the machinery thereof in smooth running. If the amendment is permissible and the law allows the amendment at this stage it is irrelevant that the Government may not be able to find a defence to the new pleading. All I have got to consider is whether this plea should be allowed to be taken at this stage or not. I do not think that the proposed amendment is dishonest. Arguments have already been addressed to me by the learned Senior Federal Counsel, on behalf of the Government, on regulation 44. The prejudice referred to in the decided cases is the prejudice whereby the position of a party may be so altered that it cannot be compensated by costs. Leave is given to amend the pleadings even at the hearing although the court does not readily allow such amendments if the necessity for such amendments should have been abundantly apparent much earlier and was not asked for. In this case, however, although the plaintiff should have asked for an amendment of the statement of claim at a much earlier stage I do not think the delay is fatal to the application provided the defendant can be compensated by costs. There can be no prejudice whatsoever to the defendant. As I have said earlier the entire case revolves on the determination of pure questions of law. All the evidence is already before the court. No fresh evidence is required or likely to be led on the issues which may arise as a result of the amendment. No new cause of action is being introduced by the plaintiff. It is only the validity of the regulations under which he was prematurely retired that comes in question. There can possibly be no sudden surprise about it to the defendant. The nature of the suit still remains the same and it is not changed into a suit of another nature.

In the circumstances I allow the amendment. The plaintiff will, however, pay the costs of the amendment and the costs of the hearing so far. The suit will be adjourned, amended pleadings filed and the defendant will have a right to file an amended statement of defence. The hearing of this suit is adjourned to the 26th at 9.00 a.m. and the hearing will continue on the 27th September.

Order accordingly.

Solicitors: *Lim Kean Chye & Co.*

KONG LAI SOO v. HO KEAN

[A.C.J. (Sharma J.) September 14, 1973]
[Ipoh — Civil Appeal No. 37 of 1972]

Landlord and Tenant — Action for recovery of premises — Obscene act — Allegation that son of tenant exposed his private parts with intention that landlord's daughter living in another part of premises could see them — Whether premises used for illegal or immoral purpose — Control of Rent Act, 1966, s. 16(1)(d).

The appellant had applied for recovery of premises which had been let out to the respondent. The application was based on section 16(1)(d) of the Control of Rent Act, 1966 and it was alleged that one of the sons of the respondent while in the part of the house which was let out to the respondent exposed his private parts with the intention that the landlord's daughter, who was living in another part of the house of which the respondent was not the tenant, could see them. The learned magistrate dismissed the application and the appellant appealed to the High Court.

Held: on the facts the defendant's son who was living with him had used the premises for an immoral purpose even it be on a solitary occasion and this was enough to enable the appellant to apply for recovery of possession under section 16(1)(d) of the Control of Rent Act, 1966.

Cases referred to:-

(1) *S. Schneiders & Sons Ltd.* v. *Abrahams* [1925] 1 K.B. 301, 305-307.

(2) *Hodson* v. *Jones* [1951] W.N. 127.

(3) *Rolls* v. *Miller* (1884) 27 Ch. D. 71, 81.

(4) *Portman* v. *Home Hospital Association* M.R. Dec. 1, 1879.

(5) *Jayantilah Motilal Pathak* v. *Dayaram Ranchhoddas* A.I.R. 1955 Bom. 111.

(6) *Kanchanmala Dassi* v. *Lilabati Debi* A.I.R. 1951 Cal. 164.

(7) *Upfill* v. *Wright* [1911] 1 K.B. 506.

CIVIL APPEAL.

Choong Yik Son for the appellant.

Chandran Nair for the respondent.

Sharma J. (delivering oral judgment): The plaintiff as the landlord of premises No. 21 Osborne Street, Ipoh, filed an action in the Magistrate's Court at Ipoh for recovery of a part of the said premises which had been let out to the defendant. The claim of the plaintiff was based under section 16(1)(d) of the Control of Rent Act 1966.

The defendant's son had been charged in the Magistrate's Court, Ipoh, for offences under sections 447 and 509 of the Penal Code and had been convicted on those charges. As far as the offence under section 447 of the Penal Code is concerned it was totally irrelevant in its application to section 16(1)(d) of the Control of Rent Act 1966 and we need not go into it at all. It is only the offence under section 509 of the Penal Code that is material. One of the sons of the defendant, Ho Yuen Seng, had on 9 March 1971 at about 7.20 a.m. while in the part of the premises which were let out to the tenant exposed his private parts with the intention that the landlord's daughter could see them. He was thereby undoubtedly outraging the modesty of the landlord's daughter who was also living in another part of the premises of which the defendant was not the tenant. No evidence was led at the hearing and it was agreed by the parties that the only point to be considered and decided was whether the obscene act of the tenant's son could entitle the landlord to possession of the premises.

Section 16(1)(d) of the Control of Rent Act, 1966 is not very elegantly worded. There are so many semi-colons appearing in sub-clause (d) of that section. There also appears a comma after the word "tenant" in the opening words of the sub-clause. It may perhaps be best to reproduce section 16(1)(d) here. It reads —

"(d) where the tenant, or any person residing or lodging with him or being his subtenant has been guilty of conduct constituting a nuisance or persistent annoyance to persons in the neighbourhood; or of using or permitting the use of the controlled premises for illegal or immoral purposes; ... and, if such person is a lodger or subtenant, the court is satisfied that the tenant has not, before the making or giving of the order of judgment, taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant."

It is only with the words "of using or permitting the use of the controlled premises for illegal or immoral purposes" that we are here concerned, but the question arises whether any opening words of the sub-clause should be deemed to precede these words and if so what are those words. There is no evidence that the tenant permitted his son to expose his private parts in the premises. The appearance of a comma after the word "tenant" in section 16(1)(d) was not necessary but having been put there it has got to be taken into consideration. In my view and from a plain reading of sub-clause (d) the words "where the tenant, or any person residing or lodging with him or being his subtenant has been guilty" should be taken to go and precede the words appearing in the second part of the sub-clause, *i.e.* "of using or permitting the use of the controlled premises for illegal or immoral purposes." If it were not so the second limb of the sub-clause would be incomplete and if read alone meaningless and absurd. Again the son of the tenant could not have been a lodger or a subtenant and he could only come under the category of "any person residing" referred to in the sub-clause. Both these points have been very rightly conceded by the learned counsel for the respondent.

The object of the clause seems to be to deal with cases in which the improper user of the premises is in furtherance of an unlawful or immoral purpose. The word "immoral" is very comprehensive. Its varying content depends upon time, place and state of civilisation of a particular society. No universal standard can be laid down. Decided cases seem to have confined it to sexual immorality. Premises used for prostitution will certainly be within the said word.

Two primary questions arise in this case. First, was the defendant's son *using* the premises to expose his private parts and was his act an immoral act intended for immoral purposes? There is no doubt that as far as the act goes and the purpose of the act is concerned it was an immoral act designed for an immoral purpose. The time was 7.20 in the morning. In my view the defendant's son took the protection of the premises and its structure in exposing his private parts to the view of the plaintiff's daughter and in making use of such protection he was using the premises for an immoral purpose. It is said that in order to come within clause 16(1)(d) the premises should be used for the immoral purpose and not merely should have been the scene of the act itself. So far as the section goes if there has been a user of the premises it suffices. There should, however, not be an *accidental* connection of the premises with the act complained of. If there is only an accidental connection then of course the act does not fall within section 16(1)(d). Some guidance could be obtained from a few English authorities but under the relevant English law on which these authorities are based the words used there are "convicted of an offence for using or permitting the use of controlled premises for illegal or immoral purposes." No conviction is required under our law for the purposes of section 16(1)(d). All that is made sufficient is improper conduct in the use of premises and such user should be for illegal or immoral purposes.

The first case I like to refer to is *S. Schneiders and Sons, Limited* v. *Abrahams*.[1] Bankes L.J. in that case observed:

"This case raises a short but important point upon the meaning of certain words in section 4 of the Rent Restrictions Act, 1923, which leave the intention of the legislature in considerable doubt. ... The effect of section 4(b) is that no judgment for the recovery of possession of any dwelling-house to which the Act applies shall be given unless, among other conditions, 'the tenant ... has been *convicted* of using the premises or allowing the premises to be used for an immoral or illegal purpose.' ... whether the user of the premises is an essential element in the constitution of the offence, so that the user must be charged in the indictment and the offence must be described therein as the offence of using the premises for some purpose being an immoral or illegal purpose; or whether it is enough that the user should be not an essential element, but merely an incidental circumstance of the offence. Secondly, assuming that the latter is the intention of the Act, is it enough to disentitle the tenant to protection that he should have once used the premises for an immoral or illegal purpose, or is a continuous or frequent user necessary? ... To constitute the offence of receiving goods knowing them to be stolen it is not necessary that the receiving should be on any premises, but incidentally the receiving in this case took place on these premises. Is this such an offence as is contemplated in section 4(b) of the Rent Restrictions Act, 1923?

In looking for the intention of the Act it is material to consider what class of offences would be included, if the words were given a strict technical construction which would limit their application to those offences in which the user of premises is an essential element. The number of those offences is comparatively small. These are offences for 'keeping' premises for this or that immoral purpose, which would not come within a technical construction of 'using' premises; and yet keeping the demised premises as a brothel would surely be within the contemplation of section 4(b). ... I reject the argument that the section includes only offences in which user of the premises is an essential element. But I think it is necessary to show that the tenant has taken advantage of his tenancy of the premises and of the opportunity they afford for committing the offence. In this view the tenant who uses the demised premises as a coiner's den, or as a deposit for stolen goods, and is convicted of counterfeiting coin or receiving goods, would be 'convicted of using the premises for an ... illegal purpose' within the meaning of section 4.

That disposes of the more difficult question. The second point was that when the statute refers to 'using the premises.' it intends something more than a single act of user and means a continuous, frequent, or repeated use. I cannot assent to that suggestion. It may be that the mere fact of a crime being committed on the premises would not constitute a user of the premises by the tenant for an illegal purpose; for example, if the tenant was convicted of an assault upon some one who happened to be on the premises in the occupation of the tenant, and if that were the only evidence, I doubt whether the tenant could be said to have been convicted of 'using the premises for an ... illegal purpose' within the meaning of section 4."

Scrutton L.J. in the same case at page 308 said:

"The words 'using the premises ... for an immoral ... purpose' are very curious, because a defendant cannot be convicted of using premises for an immoral purpose which is not also illegal."

I have already observed that in our Act conviction is not a necessary ingredient for bringing the case within section 16(1)(d). This case was followed in *Hodson* v. *Jones*[2] and both the points whether use of the premises was an essential ingredient of the crime or carried with it a wider meaning and whether one isolated conviction for an offence was enough were considered in this case.

In the case of *Rolls* v. *Miller*[3] there is a note of the case of *Portman* v. *Home Hospital Association*[4] which contains the judgment of Jessel, M.R. where he said:

"The covenant is that the lessee should not use the premises, or any part thereof, or permit the same or any part thereof to be used in the exercise of any art, trade, or business, occupation, or calling whatsoever. The terms 'use or permit to be used' seem to me to get rid of much of the difficulty, because the accident of something taking place in the house is not permitting the house to be used for that purpose. Suppose, for instance, that a man residing in a private dwelling-house calls in a physician, because he or any member of his family is ill. The physician could exercise his calling or occupation in the house, he could use the art of healing, and perhaps receive his fee before leaving the house, but I should not hold that to be a breach of the covenant, because it is not using or permitting the house to be used. It would be a mere accident, not that to which the use of the house is devoted. Now, suppose instead of this you take a collection of any patients who may come, which, as I understand, is intended here, of thirty or forty in number, and then call in a physician who receives his fee, you are using the house for that very purpose. Your object is to get them into that house, and to use the house for allowing the physician to exercise his calling there, and it appears to me that that shews the distinction between the using or permitting the house to be used, and the accident of the patient being in the house."

That part of section 16(1)(d) which relates to the tenant using or permitting the use of the premises for illegal or immoral purposes does not apply in this case. The defendant's son was a person residing with the tenant and it was he who used the premises for an immoral purpose even if it be on a solitary occasion and as held by the two earlier cases already cited by me it was enough to bring the plaintiff within that class to apply for possession of the premises as under section 16(1)(d) the impugned user by a person residing with the tenant is sufficient to take the protection of the Act away from the tenant.

In an Indian case *Jayantilal Motilal Pathak* v. *Dayaram Ranchhoddas*[5] the tenant was prosecuted and convicted for an offence under the Bombay Prohibition Act, the offence being one of possession of liquor. Under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (section 13(1)(c)) the requirement of a conviction exists as in the 1923 English Act. It was held that it was not necessary that the user of the premises for an illegal purpose should be continuous or frequent and that a single conviction was enough.

As I have already indicated the word "immoral" has a very wide meaning. It cannot be limited to the ideas and notion of a brothel. Prostitution and living as only one man's mistress differ only in degree but stand on the same plane. The latter is sufficiently immoral to come within the meaning of the Rent Control Act. (See *Kanchanmala Dassi* v. *Lilabati Debi*[6] and *Upfill* v. *Wright*.[7])

My duty is only to interpret the words of section 16(1)(d) and to gain and gather the intention of the Legislature from the words used in the section. It may be that such interpretation may cause the tenants a lot of hardship and this case might open a very convenient means to the landlords to get possession of the premises but that is a matter more for the Legislature or for the politicians than the court. Furthermore the Rent Control Act takes away from landlord his common law rights and it is for that reason my duty to interpret this piece of legislation in favour of the landlord provided there is room for such an interpretation. I feel I cannot interpret it in any other way. It seems obvious that the Legislature intended that if a tenant was to be given the protection of the

Act he, those who resided with him, his lodgers and sub-tenants were expected to conduct themselves in such manner that they did not deviate from the code of accepted moral conduct in relation to sexual behaviour and did not cause a nuisance or persistent annoyance to others in the neighbourhood and that the premises were not used for any illegal purpose by any of them.

The appeal is allowed. The order of the learned magistrate is set aside. The respondent is ordered to deliver vacant possession of the premises to the appellant on or before the 30th November 1973. The appellant will have his cost of the appeal.

Appeal allowed.

Solicitors: *Soo Wai San & Co.; Thevin, Chandran & Siva.*

IKAU ANAK MAIL v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Gill and Ali F.JJ.) September 18, 1973]
[Kuching — Federal Court Criminal Appeal No. 4 of 1973]

Criminal Law and Procedure — Charge of murder — Defence of provocation — Burden of proof — Penal Code, s. 300, Exception 1.

Evidence Ordinance s. 105 — Defence of provocation — Burden of proof.

Penal Code, s. 300, Exception 1 — Provocation — Burden of proof.

In this case the appellant had been convicted of murder. The defence of the appellant was provocation. It was alleged that there had been some dispute between the appellant and his former wife (the deceased) relating to joint property and when the deceased accused the appellant of cheating, he pulled out a knife from his pocket and stabbed her twice. The appellant also stabbed the uncle of his former wife who had rushed to separate the two. On appeal it was argued (a) that the learned trial judge had erred in his direction on the burden of proof of provocation; (b) that the learned trial judge had failed to point out that there had been a series of acts of provocation given earlier; (c) that the learned judge and the assessors had failed to direct their minds to the gravity of the accusation on the rural mind of the appellant.

Held: (1) although the learned trial judge had pointed out that the burden of proof was on the accused to prove provocation on a balance of probability he had also stated that if the court were left with a reasonable doubt as to whether there was provocation or not they had to accept the defence. There was therefore no ground of complaint as regards his direction on the burden of proof;

(2) the learned trial judge had in fact referred in his summing-up to the previous acts of provocation;

(3) to succeed on a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court not only that by the acts of the deceased that the accused had been deprived of the power of self-control, but such acts of provocation would also have deprived a reasonable man of the power of self-control. In this case the learned trial judge had correctly directed the assessors and himself on this question.

Cases referred to:-

(1) *Jayasena* v. *R.* [1970] A.C. 618; [1970] 1 All E.R. 219.

(2) *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462.

(3) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337.

FEDERAL COURT.

Yee Shin Ching for the appellant.

Steve Shim for the respondent.

Azmi L.P.: The appellant was charged as follows:—

(1) "That you on or about the 9th day of December, 1971 at 1000 hours or thereabout, at the District Office, Bintulu, committed murder by causing the death of one, *SENIA ANAK KUN* (f) and you thereby committed an offence punishable under section 302 of the Penal Code.
(2) "That you on or about the 9th day of December, 1971 at 1000 hours or thereabout, at the District Office, Bintulu, committed murder by causing the death of one *ABANG ANAK LAWANG* (m) and you thereby committed an offence punishable under section 302 of the Penal Code."

The facts showed that Senia anak Kun and Ikau anak Mail obtained a divorce from the Native Court. Subsequently, it was necessary to distribute the joint property consisting of a joint bilek and a rubber garden. It would appear that at a certain stage of the negotiation, Senia had acquiesced to leave both the bilek and the rubber garden to a young girl who was to be adopted as their child. Later, Senia changed her mind. It was for the purpose of settling this matter that the Administrative Officer, Banabas Sato, called them to his office. Senia arrived at the office first accompanied by her mother, Bijau anak Lawang, her uncle, Abang anak Lawang and several others. The court interpreter, William Sandah further asked her about the joint property. She insisted that she would not give up the bilek and the rubber garden, but would agree to give the rubber garden to their child after she had come of age. Subsequently, the appellant arrived. When the Administrative Officer asked him about the joint property he reiterated that these two things should go to the child. Upon hearing this, Senia said "That is cheating. I do not want to be cheated." The appellant who happened to be standing near her cried out "This is not cheating. Where is the cheating?", and thereupon he pulled out a knife from his pocket with which he stabbed her twice. Abang rushed to separate the two and in the course of doing so he was also stabbed by the appellant. Both Senia and Abang subsequently died.

At the trial the assessors found that the appellant was guilty of murdering Senia. In reference to the second charge they found the appellant guilty only of culpable homicide, not amounting to murder. The court passed a sentence of death on the first charge and ten years' imprisonment on the second charge.

The appellant appealed to the Federal Court against conviction and sentence in respect of the first charge.

Although several grounds were argued before us, we need refer to only three, because in our view the other grounds are of no substance.

The first ground of appeal was a complaint against the summing-up of the learned judge on the question of burden of proof. It was argued in effect that the learned judge had failed to direct the assessors that in a charge of murder the burden is on the prosecution to show the absence of any provocation. The learned judge did at one stage of his summing-up point out that there was a burden on the accused to prove on a balance of probability that he was deprived of the